United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

ORIGINAL

76-7160

In The

United States Court of Appeals

For The Second Circuit

MUSIC RESEARCH INC., and ADELPHI RECORDS, INC.,

Plaintiffs-Appellees-Appellants,

vs.

VANGUARD RECORDING SOCIETY, INC.,

Defendant and Third-Party Plaintiff-Appellant-Appellee,

vs.

HERB GART d/b/a HERB GART MANAGEMENT, INC.,

Third-Party Defendant.

PETITION FOR REHEARING OF DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT-APPELLEE

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PETITION FOR REHEARING OF DEFENDANT AND THIRD PARTY PLAINTIFF - APPELLANT - APPELLEE

Preliminary Statement

Vanguard Recording Society, Inc., defendant and third party plaintiff-appellant-appellee ("defendant"), pursuant to Rule 40 of the Federal Rules of Appellate Procedure, respectfully petitions this Court for rehearing on the ground that in the

opinion of petitioner this Court has overlooked or misapprehended the following points.

In subheading II of the opinion:

1. In the presence of a valid contract authorizing all of defendant's acts, subsequent reliance by plaintiff on defendant's deliberate, fraudulent statements is not material and cannot give rise to an actionable fraud claim; and

2. The record is wholly devoid of proof that plaintiff parted with anything of value in reliance on fraudulent statements and the fraud claim must, therefore, fail; and

In subheading IV of the opinion:

3. The excluded evidence should have been admitted to prove that the artist had validly repudiated his contract with plaintiff and that plaintiff, therefore, had no standing to sue.

ARGUMENT

POINT I

IN THE PRESENCE OF A VALID CONTRACT AUTHORIZING ALL OF DEFENDANT'S ACTS, SUBSEQUENT RELIANCE BY PLAINTIFF ON DEFENDANT'S DELIBERATE, FRAUDULENT STATEMENTS IS NOT MATERIAL AND CANNOT GIVE RISE TO AN ACTIONABLE FRAUD CLAIM.

The opinion states (under II):

> "When Judge Brieant dismissed the contractual claims at the end of plaintiff-appellee's case he did so because he held that Gart had apparent authority to contract, and that a valid contract existed between Music Research and Vanguard before any of the acts complained of took place."

However, the opinion misapprehends our contentions when it states that based on the dismissal of the other claims, we argue that "the evidence does not support a finding of reliance on the part of" the plaintiff.* This Court finds that this was an issue of fact which was submitted to the jury, and since there was no objection to the charge, we "cannot now claim that as a matter of law there could not have been reliance by Music Research."

The Court quite evidently misapprehends the thrust of our argument in this respect and the import of the authorities on which we rely. For the convenience of the Court, the portion of our original brief dealing with these authorities is reproduced as an appendix to this petition. Reliance by plaintiff is wholly immaterial to this case and, for the sake of argument, may be conceded.

In all the cases on which we rely <u>there was deliberate fraud and reliance</u>, but the plaintiff could not recover, because the law permits no recovery for fraud against a defendant who (as is not disputed here) acts within a pre-existing valid contract.

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* For other reasons and in a different context, we argued that there could be no reliance as a matter of law. However, in the light of this Court's opinion, these arguments are no longer relevant.

The comments contained in footnote 5 of the opinion do not seem pertinent. Whatever inferences the jury might have drawn from the evidence are irrelevant because the only material issue, namely, Gart's apparent authority and the consequent validity of the contract, had been settled as a matter of law by Judge Brieant.

This case is squarely governed by the authorities on which we rely, this Court has suggested no distinction, and none is possible. In effect, this Court has sub silentio overruled the binding holdings of the highest court of New York. All jurisdictions, including this Circuit, in which the question has arisen agree with the New York Court of Appeals.

However maladroit trial counsel's failure to object to the charge may have been, it cannot legitimately affect the decision in this case, for under settled law there was no prima facie case that could go to the jury, whatever the charge may have been.

In imposing liability on a defendant for doing no more than what was authorized by a contract held to be legal and binding, this decision is unique and seems to run counter to common sense.

POINT II

THE RECORD IS WHOLLY DEVOID OF PROOF THAT PLAINTIFF PARTED WITH ANYTHING OF VALUE IN RELIANCE ON FRAUDULENT STATEMENTS AND THE FRAUD CLAIM MUST, THEREFORE, FAIL.

The opinion stresses plaintiff's reliance on defendant's fraudulent statements, but reliance without more is not sufficient to permit plaintiff to recover. It is elementary under New York law that plaintiff may only recover for what he parted with in reliance on defendant's fraud. Reno v. Bull, 226 N.Y. 546 (1919).

Obviously, if all of defendant's acts were authorized by contract, plaintiff gave up nothing in reliance on false statements. But even if it were assumed that defendant did not have a valid contract, the record is barren of any suggestion that plaintiff parted with anything of value in reliance on defendant's fraud. The only subject matter at issue was the right to release Hurt records, an intangible. According to plaintiff, it never parted with those rights. Nor does the opinion purport to find that plaintiff parted with those rights in reliance on defendant's fraud. Assuming the absence of a valid contract, defendant may have committed various torts against plaintiff, but plaintiff parted with nothing in reliance on false statements. The opinion turns topsy turvy the well-settled law of fraud.

POINT III

THE EXCLUDED EVIDENCE SHOULD HAVE BEEN ADMITTED TO PROVE THAT THE ARTIST HAD VALIDLY REPUDIATED HIS CONTRACT WITH PLAINTIFF AND THAT PLAINTIFF, THEREFORE, HAD NO STANDING TO SUE.

Point IV of the opinion evidently misapprehends the thrust of our argument. Contrary to what the opinion states, defendant is not in the position of a third party urging the unconscionability of a contract as a defense.

As the opinion observes, plaintiff's recording rights derived from a contract with one Hurt. Evidence was submitted below that Hurt had repudiated the contract. If Hurt had validly repudiated his contract with plaintiff, as defendant wanted to prove, plaintiff obviously had no standing to sue, for all rights pertaining to recordings had reverted to Hurt.

The excluded evidence of unconscionability was essential to establish Hurt's legal right to repudiate his contract with plaintiff and to show that plaintiff had no standing to sue.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, IT IS RESPECTFULLY PRAYED THAT THIS PETITION BE GRANTED AND THAT THIS COURT REVISE ITS ORDER HEREIN.

Respectfully submitted,

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APPENDIX

Prosser, Torts (4th ed. 1971) §110, p. 731, states the rule as follows:

> "...there can be no recovery if the plaintiff is no worse off for the misrepresentation, however flagrant it may have been, as where for example he...is induced to do only what his legal duty would require him to do in any event."

In Story v. Conger, 36 N.Y. 673 (1867) defendant had bound himself by contract to convey to plaintiff good title to certain real property. The Court held that good title meant that there were no tax arrears and that in delivering a deed in which he convenanted that there were none, defendant had "but fulfilled that written contract." In so holding, the Court said (at p. 676):

> "Upon his own statement of the contract, the defendant has done no more than he was legally bound to do. If unjust or immoral means have been resorted to, to induce him to perform that duty, there is no remedy. In its result the case stands where and as it ought to stand. Hutchins v. Hutchins, 7 Hill, 104; Story Eq. Jur., §203; Randall v. Hazelton, 12 Allen, 412, 415."

In Deobold v. Oppermann, 111 N.Y. 531 (1888), following the rule of Conger, the Court of Appeals held

(at pp. 541-42):

> "...It is of the very essence of an action of fraud or deceit, that the same should be accompanied by damage, and neither damnum absque injuria, or injuria absque damnum, by themselves constitute, a good cause of action. (Hutchins v. Hutchins, 7 Hill, 104; Michigan v. Phoenix Bk., 33 N.Y. 9.) Neither can a party claim to have been defrauded who has been induced by artifice to do that which the law would have otherwise compelled him to perform. (Thompson v. Menck, 2 Keyes, 82; Story v. Conger, 36 N.Y. 673; 93 Am. Dec. 546; Randall v. Hazeltine, 12 Allen, 412.)

This Court applied the same rule in China Fire Ins. Co. v. Davis, 50 F.2d 389, 391 (2d Cir. 1931), holding (per Learned Hand, J.):

> "...it is immaterial whether the plaintiff, the obligor, was fraudulently induced to pay that which was in any case due. Deobold v. Oppermann, 111 N.Y. 531, 19 N.E. 94, 2 L.R.A. 644, 7 Am. St. Rep. 760; Story v. Conger, 36 N.Y. 673, 93 Am. Dec. 546; Randall v. Hazelton, 12 Allen (Mass.) 413; Plews v. Burrage (D.C.) 19 F. (2d) 412."

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Third Party Defendant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the 13th *day of* January *19* *at* 375 Park Avenue
New York, N.Y.

deponent served the annexed petition for rehearing *upon* Baker & McKenzie, Esqs.

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 13th *day of* January, *19* 77

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Reuben Shearer
Reuben Shearer